to the governor's discretion; there is no right to a correct decision. Again, unrestrained disclosures seem relatively unimportant in a petition for pardon, since, unlike the case of an action where there are pleadings, the petitioners may, without amending their petition, bring forward further grounds for clemency; and the executive in deciding whether to grant immunity is not confined to a consideration of the facts and reasons adduced by the petitioners. Furthermore, this informality may make such petitions a mere cloak for libel, whereas judicial proceedings would not be instituted for the sole purpose of inserting a libel in the pleadings. As to the analogy relied on to memorials to legislatures, such petitions, by the better view in America, are only absolutely privileged when they become a part of the legislative proceedings.[8] The clause in the Texas Constitution would not seem to change the situation, for it only assures the right to file the petition, not to have an adjudication.[9] And the ever increasing facilities for disseminating what is published seems a further argument to reënforce the policy against extending the privilege.

RIGHT OF CORPORATION TO PURCHASE ITS OWN STOCK. — No subject presents greater conflict on the authorities than the right of a corporation to purchase its own shares. While the majority of American decisions permit corporations to do this, provided the rights of creditors are not involved,[1] the English authorities and a substantial minority of the American courts hold such transactions *ultra vires*.[2] They argue that such a power is not one which it is necessary that the corporation should possess to carry on its business satisfactorily. A number of the jurisdictions following this view, however, have held that the receipt of shares in satisfaction or as security for an indebtedness is quite within

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[8] See Cook *v.* Hill, 3 Sandf. (N.Y.) 341. In England the early case of Lake *v.* King, 1 Saund. 131 a, is said to have established the principle that petitions to Parliament are absolutely privileged. See ODGERS, LIBEL AND SLANDER, 3 ed., 209. And the same was held still earlier of a petition to the Queen. Hare and Mellers Case, 3 Leon. 138, 163. Both of these early cases seem to proceed on the theory that Parliament and the Crown are part of the judicial system of England. They furnish, therefore, no analogy for petitions to American legislatures.

[9] Art. 1, § 27, "The citizens shall have the right in a peaceable manner, to assemble together for their common good, and to apply to those invested with the power of government for redress of grievances or other purposes, by petition, address, or remonstrance." It should be observed that peculiar provisions in a state constitution, creating a Board of Pardons and providing for formal applications and hearings, may substantially amount to forming a separate judicial tribunal. Keenan *v.* McMurray, 34 Pitts. Leg. J. N. S. 223.

[1] Hartridge *v.* Rockwell, R. M. Charlton (Ga.), 260; Dupee *v.* Boston Water Power Co., 114 Mass. 37; Chicago, etc. R. Co. *v.* Marseilles, 84 Ill. 643; Porter *v.* Plymouth Gold Mining Co., 29 Mont. 347, 74 Pac. 938; Fremont Carriage Mfg. Co. *v.* Thomsen, 65 Neb. 370, 91 N. W. 376. But note that while *ultra vires*, the transaction is not so objectionable as to justify *quo warranto* against the corporation. State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020.

[2] Trevor *v.* Whitworth, L. R. 12 A. C. 409; Maryland Trust Co. *v.* Nat. Mechanics Bank, 102 Md. 608, 63 Atl. 70; Wilson *v.* Torchon Lace & Mercantile Co., 149 S. W. 1156 (Mo.); Coppin *v.* Greenlees & Ransom Co., 38 Oh. St. 275; German Savings Bank *v.* Wulfekuhler, 19 Kan. 60.

the corporate powers.[3] If in these cases the corporation has power to receive its own shares, there seems no reason in the nature of things why it has not power to purchase under other circumstances. Moreover, the objection cannot be raised that the corporation by such dealings increases or diminishes its capital stock, a thing frequently forbidden by statute, because the authorities are practically unanimous in holding that the purchase does not extinguish the shares bought but merely transfers them into the hands of the company.[4] Hence the objection to the practice instead of resting on a lack of power must find its logical basis in the disadvantages to other shareholders and to corporate creditors which may result from such transactions.

There seem two objectionable features to such purchases so far as other shareholders are concerned. First, the purchase of shares reduces the amount of capital embarked in the corporate enterprise and thus the burden of meeting the company's liabilities falls more heavily on the remaining shares. In the event of insolvency, in case shareholders have some form of individual liability, or if they are only liable to the full par value of their stock, the amount for which each shareholder may be held is made correspondingly larger. Second, the buying in of stock with corporate funds in part contributed by a minority opposing the sale may well enable a rival majority to obtain a strangle hold upon the corporate affairs, since the amount of votable stock is thereby temporarily at least decreased [5] and the influence of the majority made correspondingly greater.[6] These considerations, however, do not furnish a conclusive ground for absolutely prohibiting such transactions, but merely should give to any non-consenting shareholder a right to have them set aside.[7]

The objections as to the reduction of the fund available for the payment of the company's debts apply even more strongly to creditors, but the courts seem more or less at a loss as to how to treat this situa-

[3] Taylor *v.* Miami Exporting Co. 6 Oh. 176; see St. Louis Rawhide Co. *v.* Hill, 72 Mo. App. 142, 148 (in payment of a debt due the corporation); see German Savings Bank *v.* Wulfekuhler, 19 Kan. 60, 65 (in security of a debt due the corporation); State *v.* Oberlin Building & Loan Association, 35 Oh. St. 258 (took stock and released from liabilities on it and collateral). Likewise receipt by way of gift or devise would probably be sustained in these jurisdictions although the question has only been adjudicated elsewhere. Lake Superior Iron Co. *v.* Drexel, 90 N. Y. 87; Rivanna Navigation Co. *v.* Dawsons, 3 Gratt. (Va.) 19.

[4] On the theory of choses in action, this is hardly sustainable, but the stock is apparently treated more like a chattel or negotiable note, and, in the absence of contrary evidence is considered to be merely temporarily retired and to be subject to re-issue. State *v.* Smith, 48 Vt. 266; City Bank of Columbus *v.* Bruce, 17 N. Y. 507; Commonwealth *v.* Boston & Albany R., 142 Mass. 146, 7 N. E. 716; see Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418, 452; Currier *v.* Lebanon Slate Co., 56 N. H. 262, 268; Taylor *v.* Miami Exporting Co., 6 Oh. 176, 219; *contra*, 1 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., § 112.

[5] For although shares of stock bought in by the corporation are not extinguished they cannot of course be voted while held by the company. American Ry. Frog Co. *v.* Haven, 101 Mass. 398; M'Neely *v.* Woodruff, 13 N. J. L. 352.

[6] For a more detailed explanation of this objection, see 1 MACHEN, MODERN LAW OF CORPORATIONS, § 626.

[7] Currier *v.* Lebanon Slate Co., 56 N. H. 262; *cf.* Glenn *v.* Hatchett, 91 Ala. 316, 8 So. 656; (agreement to release a shareholder from unpaid subscriptions on stock, retiring a part and treating remainder as fully paid).

tion. Many courts have held that the assets of the corporation are a trust fund for the benefit of creditors.[8] But this theory even if valid does not solve the problem, for the assets do not become a trust fund until the corporation is insolvent,[9] and it is clear that even before insolvency a reduction in the actual capital may work a detriment to creditors in that it takes away their right to look to the entire capital as a security for the indebtedness of the corporation. The proper treatment of the situation would seem to be on the recognized principle of fraudulent conveyances. That is, any such reduction is a fraud on prior creditors because it is a distribution of assets for which nothing of value to the creditors is received in return; and on subsequent creditors because they contract on faith of assets represented by the capital stock.[10] Accordingly a purchase by an insolvent corporation of its own shares either by cash or note should be voidable.[11] If the corporation was solvent but made the payment from its capital fund, it would seem that the creditors should in every case be able to avoid the transaction,[12] this being particularly clear where the need of those assets to pay their debts could be foreseen.[13] Where the purchase is made from such surplus as could legitimately be paid in dividends the above objection would not apply, however, because the assets on which the creditors have a right to rely have not been depleted.[14] Yet, if the result would be to free from individual liability a shareholder who would otherwise be personally liable to creditors, it would seem that the transaction should be voidable, but only to the extent of permitting a recovery by the creditor of the amount of this personal liability.[15] In a recent case,

[8] This theory was first adopted by Story, J., in Wood *v.* Drummer, 3 Mason (U. S.) 308.

[9] See Graham *v.* Railroad Co., 102 U. S. 148, 161; Hollins *v.* Brierfield Coal & Iron Co., 150 U. S. 371, 383.

[10] Hospes *v.* Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N. W. 1117. For a fuller discussion of this problem, see 20 HARV. L. REV. 401.

[11] *In re* Smith Lumber Co., 132 Fed. 618; Buck *v.* Ross, 68 Conn. 29 (using the language of the trust theory).

[12] The corporation should be treated as under an absolute duty to keep its entire capital fund as a margin of safety for creditors. On this theory any decrease in that fund would be a fraud upon them even though at the time its retention seemed unnecessary.

[13] Hence the cases which purport to proceed on the trust theory, despite the fact that no trust should arise until after insolvency, have in general protected the corporate creditors by holding such transactions void as to them. Crandall *v.* Lincoln, 52 Conn. 73 (showing that the shareholder will not be permitted to retain the assets received, as a *bonâ fide* purchaser without notice); Tait *v.* Pigott, 32 Wash. 344, 73 Pac. 364. See Hamor *v.* Taylor-Rice Engineering Co., 84 Fed. 392. But see Marvin *v.* Anderson, 111 Wis. 387, 87 N. W. 226. And note the same result where dividends are paid out of the capital fund. Fricke *v.* Angemeier, 101 N. E. 329 (Ind.); Detroit Trust Co. *v.* Goodrich, 175 Mich. 168, 141 N. W. 882. *Contra*, McDonald *v.* Williams, 174 U. S. 397.

[14] 1 COOK, CORPORATIONS, 7 ed., § 311; Fraser *v.* Ritchie, 8 Ill. App. 554; Howe Grain & Mercantile Co. *v.* Jones, 21 Tex. Civ. App. 198, 51 S. W. 24; Dock *v.* Schlichter Jute Cordage Co., 167 Pa. St. 370, 31 Atl. 656. In 1 MACHEN, MODERN LAW OF CORPORATIONS, § 626, it is argued that a fraud upon creditors occurs here, since the reduction of the amount of capital stock outstanding makes it possible for the corporation to thereupon reduce its assets to the point to which the capital has been reduced. This argument, however, assumes that stock purchased is retired and reduces the amount of capital which we have seen to be contrary to authority. See Note 4.

[15] No cases upon this point have been found. It is submitted, however, that there

however, a corporation having a surplus in hand purchased stocks outstanding by note. It was held that, on subsequent insolvency of the company the holder could not come in with general creditors to claim a dividend from the company upon his claim. *In re Fechheimer-Fishel Co.*, 50 N. Y. L. J. 2853 (C. C. A., 2nd Circ.). It is possible that there were elements of fraud in the transaction not fully disclosed by the report which justified this result. Unless there were such facts, if we concede the power of the corporation to purchase its own stock, there seems no reason why the creditors should have been allowed to avoid this transaction.

THE RIGHT TO TAKE FISH AND GAME IN NAVIGABLE NON-TIDAL WATERS. — Since it is often said that only those waters in which the tide ebbs and flows are navigable under the common law of England, it is important to observe carefully the technical meaning of the word navigable when so used. At an early date title to the land beneath the sea and tidal rivers was conceived to be in the king,[1] whereas title to the land under inland waters where the tide did not ebb and flow, was in the private riparian proprietors.[2] Perhaps because tide water in England included nearly all water navigable in fact, or because of the Lord Admiral's jurisdiction over shipping in tidal waters,[3] the term "navigable water" came to be loosely used as a synonym for tide water.

While no one can obtain absolute property in fish and game except by reduction to possession,[4] and therefore their ownership while uncaptured does not go with the realty; the right to take creatures *feræ naturæ*, transiently upon land, is recognized as a valuable property right incident to its ownership.[5] So in ancient times, the right to fish in the sea was the exclusive prerogative of the king as lord of the soil; but either by Magna Charta, or by the gradual encroachment upon royal prerogative as the representative character of the sovereign became recognized, the king's right to the sea came to be regarded as held in trust for the public, and the right to fish became free and common to all.[6] This right though arising independently of the public ownership of the soil, thus chanced here to be co-extensive with the right of navigation. In English non-tidal streams, however, the exclusive right of fishery is in the riparian proprietor of the soil.[7] Inasmuch as these inland waters

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is no fraud in the transaction as against creditors except as it releases the shareholder from individual liability and that creditors cannot set aside the transaction to any greater extent and cannot claim the purchase price received for the shares.

[1] HALE, DE JURE MARIS, cap. 4.

[2] *Ibid.*, cap. 1.

[3] See Ilchester *v.* Raishleigh, 61 L. T. N. S. 477, 479.

[4] See Geer *v.* Connecticut, 161 U. S. 519, 16 Sup. Ct. 600.

[5] So that a statute requiring a license for non-resident hunters is unconstitutional as applied to non-resident landowners. State *v.* Mallory, 73 Ark. 236, 83 S. W. 955. And see cases cited in note 14, *infra*.

[6] See 2 FARNHAM, WATERS AND WATER RIGHTS, § 368.

[7] Pearce *v.* Scotcher, L. R. 9 Q. B. D. 162; Smith *v.* Andrews, [1891] 2 Ch. 678; Murphy *v.* Ryan, Ir. R. 2 C. L. 143. See Reece *v.* Miller, L. R. 8 Q. B. D. 626. As to fowling see Fitzhardinge *v.* Purcell, [1908] 2 Ch. 139.